



## Virtual Hearings in Agency Adjudication

### Committee on Adjudication

#### Proposed Recommendation for Committee | May 12, 2021

1           The use of video conferencing (VTC) to conduct administrative hearings and other  
2 adjudicative proceedings has become increasingly prevalent over the past few decades due to  
3 rapid advances in technology and telecommunications coupled with reduced personnel, increased  
4 travel costs, and the challenges of the COVID-19 pandemic. As the Administrative Conference  
5 has recognized, “[s]ome applaud the use of VTC by administrative agencies because it offers  
6 potential efficiency benefits, such as reducing the need for travel and the costs associated with it,  
7 reducing caseload backlog, and increasing scheduling flexibility for agencies and attorneys as  
8 well as increasing access for parties.” At the same time, as the Administrative Conference has  
9 acknowledged, critics have suggested that the use of VTC may “hamper communication” among  
10 participants—including parties, their representatives, and the decision maker—or “hamper a  
11 decision-maker’s ability to make credibility determinations.”<sup>1</sup>

12           The Administrative Conference has encouraged agencies, particularly those with high-  
13 volume caseloads, to consider “whether the use of VTC would be beneficial as a way to improve  
14 efficiency and/or reduce costs while also preserving the fairness and participant satisfaction of  
15 proceedings.”<sup>2</sup> Recognizing that the use of VTC may not be appropriate in all circumstances and  
16 must be legally permissible, the Administrative Conference has identified factors for agencies to  
17 consider when determining whether to use VTC to conduct hearings. They include whether the  
18 nature and type of adjudicative hearings conducted by an agency are conducive to use of VTC;

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<sup>1</sup> Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48795, 48795–96 (Aug. 9, 2011).

<sup>2</sup> *Id.*



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19 whether VTC can be used without adversely affecting case outcomes or representation of parties;  
20 and whether the use of VTC would affect costs, productivity, wait times, or access to justice.<sup>3</sup>  
21 The Administrative Conference has also set forth best practices and practical guidelines for  
22 conducting video hearings.<sup>4</sup>

23 When the Administrative Conference issued these recommendations, most video  
24 participants appeared in formal hearing rooms equipped with professional-grade video screens,  
25 cameras, microphones, speakers, and recording systems. Because these hearings rooms were  
26 usually located in government facilities, agencies could ensure that staff were on site to maintain  
27 and operate VTC equipment, assist participants, and troubleshoot any technological issues. This  
28 setup, which this Recommendation calls a “traditional video hearing,” gives agencies a high  
29 degree of control over VTC equipment, telecommunications connections, and hearing rooms.

30 Videoconferencing technology continues to evolve, with rapid developments in internet-  
31 based videoconferencing software, telecommunications infrastructure, and personal devices.<sup>5</sup>  
32 Recently, many agencies have also allowed, or in some cases required, participants to appear  
33 remotely using internet-based videoconferencing software. Because individual participants can  
34 run these software applications on personal computers, tablets, or smartphones, they can appear  
35 from a location of their choosing, such as a home or office, rather than needing to travel to a  
36 video-equipped hearing site. This Recommendation uses the term “virtual hearings” to refer to  
37 proceedings in which individuals appear in this manner. This term includes proceedings in which

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<sup>3</sup> *Id.* ¶ 2.

<sup>4</sup> Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75114 (Dec. 17, 2014); Recommendation 2011-4, *supra* note 1; see also MARTIN E. GRUEN & CHRISTINE R. WILLIAMS, ADMIN. CONF. OF THE U.S., HANDBOOK ON BEST PRACTICES FOR USING VIDEO TELECONFERENCING IN ADJUDICATORY HEARINGS (2015).

<sup>5</sup> For example, some tribunals around the world are now exploring the use of telepresence systems, which rely on high-quality video and audio equipment to give participants at different, specially equipped sites the experience of meeting in the same physical space. See Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 326 (2021).



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38 all participants appear virtually, as well as hybrid proceedings in which some participants appear  
39 virtually while others participate by alternative remote means or in person.<sup>6</sup>

40 Although some agencies used virtual hearings before 2020, their use expanded  
41 dramatically during the COVID-19 pandemic, when agencies maximized telework, closed  
42 government facilities to the public and employees, and required social distancing.<sup>7</sup> Agencies  
43 gained considerable experience conducting virtual hearings during this period,<sup>8</sup> and this  
44 Recommendation draws heavily on these experiences.

45 Virtual hearings can offer several benefits to agencies and parties compared with  
46 traditional video hearings. Participants may be able to appear from their home using their own  
47 personal equipment, from an attorney's office, or from another location such as a public library,  
48 without the need to travel to a video-equipped hearing site. As a result, virtual hearings can  
49 simplify scheduling for parties and representatives and may facilitate the involvement of other  
50 participants such as interpreters, court reporters, witnesses, staff or contractors who provide  
51 administrative or technical support, and other interested persons. Given this flexibility, virtual  
52 hearings may be especially convenient for short and relatively informal adjudicative proceedings,  
53 such as pre-hearing and settlement conferences.<sup>9</sup>

54 But virtual hearings can pose significant challenges as well. The effectiveness of virtual  
55 hearings depends on individuals' access to a suitable internet connection, a personal device, and  
56 a space from which to participate, as well as their ability to effectively participate in an  
57 adjudicative proceeding by remote means while operating a personal device and  
58 videoconferencing software. As a result, virtual hearings may create a barrier to access for  
59 individuals who belong to underserved communities, such as low-income individuals for whom

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<sup>6</sup> See Jeremy Graboyes, Legal Considerations for Remote Hearings in Agency Adjudications 3 (June 16, 2020) (report to the Admin. Conf. of the U.S.).

<sup>7</sup> *Id.* at 1.

<sup>8</sup> See Fredric I. Lederer & the Ctr. for Legal & Ct. Tech., Analysis of Administrative Agency Adjudicatory Hearing Use of Remote Appearances and Virtual Hearings 6–7 (Apr. 14, 2021) (draft report to the Admin. Conf. of the U.S.).

<sup>9</sup> *See id.*



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60 it may be difficult to obtain access to high-quality personal devices or private internet services,  
61 individuals whose disabilities prevent effective engagement in virtual hearings or make it  
62 difficult to set up and manage the necessary technology, and individuals with limited English  
63 proficiency. Some individuals may have difficulty, feel uncomfortable, or lack experience using  
64 a personal device or internet-based videoconferencing software to participate in an adjudicative  
65 proceeding. Some critics have also raised concerns that virtual participation can negatively affect  
66 parties' satisfaction, engagement with the adjudicative process, or perception of justice.<sup>10</sup>

67 Agencies have devised several methods to address these concerns. The Board of  
68 Veterans' Appeals conducts virtual hearings using the same videoconferencing application that  
69 veterans use to access agency telehealth services. To enhance the formality of virtual hearings,  
70 many adjudicators use a photographic backdrop that depicts a hearing room, seal, or flag. Many  
71 agencies use pre-hearing notices and online guides to explain virtual hearings to participants.  
72 Several agencies provide general or pre-hearing training sessions at which agency staff, often  
73 attorneys, can familiarize participants with the procedures and standards of conduct for virtual  
74 hearings. Though highly effective, these sessions require staff time and availability.<sup>11</sup>

75 Virtual hearings can also pose practical and logistical challenges. They can suffer from  
76 technical glitches, often related to short-term, internet bandwidth issues. Virtual hearings may  
77 sometimes require agencies to take special measures to ensure the integrity of adjudicative  
78 proceedings. Such measures may be necessary, for example, to safeguard classified, legally  
79 protected, confidential, or other sensitive information, or to monitor or sequester witnesses to  
80 ensure third parties do not interfere with their testimony.<sup>12</sup> Agencies may also need to take  
81 special measures to ensure that interested members of the public can observe virtual hearings in

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<sup>10</sup> See *id.* at 8–11, 17.

<sup>11</sup> See *id.* at 10, 16–17.

<sup>12</sup> See *id.* at 11, 15.



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82 appropriate circumstances by, for example, streaming live audio or video of a virtual hearing or  
83 providing access to a recording afterward.<sup>13</sup>

84 Recording virtual hearings may raise additional legal, policy, and practical concerns. To  
85 the extent that such recordings become part of the administrative record or serve as the official  
86 record of the proceeding, agencies may need to consider whether and for what purposes appellate  
87 reviewers may consider and rely on them. Creating recordings may trigger obligations under  
88 federal information and record-keeping laws and policies, including the Freedom of Information  
89 Act,<sup>14</sup> Privacy Act,<sup>15</sup> and Federal Records Act.<sup>16</sup> Agencies may need to review contract terms  
90 when considering the use of videoconferencing software applications to determine whether any  
91 other entities own or can access or use recordings made through the applications, or whether an  
92 agency may obtain legal and practical ownership of the recording. Steps may be necessary to  
93 ensure that agencies do not inadvertently disclose classified, protected, or sensitive information  
94 or make it easy for people to use publicly available recordings for improper purposes.  
95 Practically, unless agencies store recordings on external servers, such as in the cloud, agencies  
96 would need sufficient technological capacity to store the volume of recordings associated with  
97 virtual hearings. Agencies would also need personnel qualified and available to manage and, as  
98 appropriate, prepare recordings for public access.

99 This Recommendation builds on Recommendation 2011-4, *Agency Use of Video*  
100 *Hearings: Best Practices and Possibilities for Expansion*, and Recommendation 2014-7, *Best*  
101 *Practices for Using Video Teleconferencing for Hearings*, by identifying factors for agencies to  
102 consider as they determine when and how to conduct virtual hearings. Specifically, this

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<sup>13</sup> For evidentiary hearings not required by the Administrative Procedure Act (APA), the Administrative Conference has recommended that agencies “adopt the presumption that their hearings are open to the public, while retaining the ability to close the hearings in particular cases, including when the public interest in open proceedings is outweighed by the need to protect: (a) National security; (b) Law enforcement; (c) Confidentiality of business documents; and (d) Privacy of the parties to the hearing.” Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 18, 81 Fed. Reg. 94312, 94316 (Dec. 23, 2016). Similar principles may also apply in other proceedings, including those conducted under the APA’s formal-hearing provisions. *See* Graboyes, *supra* note 6, at 22–23.

<sup>14</sup> 5 U.S.C. § 552.

<sup>15</sup> *Id.*, § 552a.

<sup>16</sup> 44 U.S.C. § 3101 *et seq.*



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103 Recommendation provides practical guidance regarding how best to conduct virtual hearings and  
104 encourages agencies to monitor technological and procedural developments that may facilitate  
105 remote participation in appropriate circumstances.

106 As emphasized in Recommendation 2014-7, the Administrative Conference is committed  
107 to the principles of fairness, efficiency, and participant satisfaction in the conduct of adjudicative  
108 proceedings. When virtual hearings are used, they should be used in a manner that promotes  
109 these principles, which form the cornerstones of adjudicative legitimacy. The Administrative  
110 Conference recognizes that the use of virtual hearings is not suitable for every kind of  
111 adjudicative proceeding but believes greater familiarity with existing agency practices and  
112 awareness of the improvements in technology will encourage broader use of such technology in  
113 appropriate circumstances. This Recommendation aims to ensure that, when agencies choose to  
114 offer virtual hearings, they are able to provide a participant experience that meets or even  
115 exceeds the in-person hearing experience.<sup>17</sup>

### RECOMMENDATION

#### **Procedural Practices**

- 116 1. If legally permissible, agencies should offer virtual hearings consistent with their needs,  
117 in accord with principles of fairness, efficiency, and with due regard for participant  
118 satisfaction. When considering whether and when to offer virtual hearings, agencies  
119 should consider, at a minimum, the following:
- 120 a. Whether the nature and type of adjudicative proceedings are conducive to the use  
121 of virtual hearings and whether virtual hearings can be used without affecting the  
122 procedural fairness or substantive outcomes of cases;
  - 123 b. Whether virtual hearings are likely to result in significant benefits for agency and  
124 non-agency participants, including improved access to justice, more efficient use  
125 of time for adjudicators and staff, reduced travel costs and delays, and reduced

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<sup>17</sup> This Recommendation does not take a position on when parties should be entitled to, or may request, an in-person hearing.



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- 126 wait times and caseload backlogs;
- 127 c. Whether virtual hearings are likely to result in significant costs for agency and
- 128 non-agency participants, including those associated with purchasing, installing,
- 129 and maintaining equipment and software, obtaining and using administrative and
- 130 technical support, and providing training;
- 131 d. Whether the use of virtual hearings would affect the representation of parties;
- 132 e. Whether the use of virtual hearings would affect communication between hearing
- 133 participants (including adjudicators, parties, representatives, witnesses,
- 134 interpreters, agency staff, and others);
- 135 f. Whether the use of virtual hearings would create a potential barrier to access for
- 136 individuals who belong to underserved communities, such as low-income
- 137 individuals for whom it may be difficult to obtain access to high-quality personal
- 138 devices or private internet services, individuals whose disabilities prevent
- 139 effective engagement in virtual hearings or make it difficult to set up and manage
- 140 the necessary technology, and individuals with limited English proficiency, or for
- 141 other individuals who may have difficulty using a personal device or internet-
- 142 based videoconferencing software to participate in adjudicative proceedings;
- 143 g. Whether the use of virtual hearings would affect adjudicators' ability to make
- 144 credibility determinations; and
- 145 h. Whether there is a reasonable concern that the use of virtual hearings would
- 146 enable someone to improperly interfere with participants' testimony.
- 147 2. Agencies should revise any provisions of their codified rules of practice that
- 148 unintentionally restrict adjudicators' discretion to allow individuals to participate
- 149 virtually, when such participation would otherwise satisfy the principles in Paragraph 1.
- 150 3. Agencies should adopt the presumption that virtual hearings are open to the public, while
- 151 retaining the ability to close the hearings in particular cases, including when the public



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152 interest in open proceedings is outweighed by the need to protect:

- 153 a. National security;
- 154 b. Law enforcement;
- 155 c. Confidentiality of business documents; or
- 156 d. Privacy of hearing participants.

157 For virtual hearings that are open to the public, agencies should provide a means for  
158 interested persons to attend or view the hearing.

- 159 4. If agencies record virtual hearings, they should consider the legal, practical, and technical  
160 implications of doing so and establish guidelines to seek to ensure, at a minimum,  
161 compliance with applicable information and recordkeeping laws and policies and guard  
162 against misuse of recordings.
- 163 5. Agencies should work with information technology and data security professionals to  
164 develop protocols to properly safeguard classified, legally protected, confidential, and  
165 other sensitive information during virtual hearings and also to ensure the integrity of the  
166 hearing process.
- 167 6. Agencies that offer virtual hearings should develop guidelines for conducting them, make  
168 those guidelines publicly available prominently on their websites, and consider which of  
169 those guidelines to include in their codified rules of practice. Such guidelines should  
170 address, as applicable:
  - 171 a. Any process by which parties, representatives, and other participants can request  
172 to participate virtually;
  - 173 b. Circumstances in which an individual's virtual participation may be  
174 inappropriate;
  - 175 c. Any process by which parties, representatives, and other participants can, as  
176 appropriate, object to or express concerns about participating virtually;
  - 177 d. Technological requirements for virtual hearings, including the internet-based  
178 videoconferencing software used for virtual hearings and any technical  
179 suggestions for participants who appear virtually;
  - 180 e. Standards of conduct for participants during virtual hearings, such as those



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- 181 prohibiting participants from appearing while operating a moving vehicle and, to  
182 account for audio delays, requiring participants to wait several seconds after  
183 others finish talking before speaking;
- 184 f. The availability of or requirement to attend a general training session or pre-  
185 hearing conference to discuss technological requirements, procedural rules, and  
186 standards of conduct for virtual hearings;
- 187 g. Any protocols or best practices for participating in virtual hearings, such as those  
188 addressing:
- 189 i. When and how to join virtual hearings using either a personal device or  
190 equipment available at another location, such as a public library;
  - 191 ii. How to submit exhibits before or during virtual hearings;
  - 192 iii. Whether and how to use screen sharing or annotation tools available in the  
193 video conferencing software;
  - 194 iv. How to make motions, raise objections, or otherwise indicate that a  
195 participant would like to speak;
  - 196 v. How to indicate that there is a technical problem or request technical  
197 support;
  - 198 vi. When adjudicators will stop or postpone virtual hearings due to technical  
199 problems and what actions will be taken to attempt to remedy the problem;
  - 200 vii. How to examine witnesses who participate virtually and monitor or  
201 sequester them, as necessary;
  - 202 viii. How parties and their representatives can consult privately with each  
203 other;
  - 204 ix. When participants should have their microphones or cameras on or off;
  - 205 x. Whether participants may communicate with each other using a  
206 videoconferencing software's chat feature or other channels of  
207 communication, and, if so, how;
  - 208 xi. How to properly safeguard classified, legally protected, confidential, or  
209 other sensitive information;



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- 210                   xii. Whether participants or interested persons may record proceedings;  
211                   xiii. Whether and how other interested persons can attend or view streaming  
212                   video; and  
213                   xiv. Whether and how participants or interested persons may access recordings  
214                   of virtual hearings maintained by the agency.
- 215       7. Agencies should provide information on virtual hearings in pre-hearing notices to  
216       participants. Such notices should include or direct participants to the guidelines  
217       described in Paragraph 6.

### **Facilities and Equipment**

- 218       8. When feasible, agencies should provide adjudicators with spaces, such as offices or  
219       hearing rooms, that are equipped and maintained for the purpose of conducting hearings  
220       that involve one or more remote participants. When designing such a space, agencies  
221       should provide for:
- 222           a. Dedicated cameras, lighting, and microphones to capture and transmit audio and  
223           video of the adjudicator to remote participants;
- 224           b. Adjudicators' access to a computer and a minimum of two monitors—one for  
225           viewing remote participants and another for viewing the record—and potentially a  
226           third for performing other tasks or accessing other information during  
227           proceedings; and
- 228           c. High-quality bandwidth.
- 229       9. Agencies should provide adjudicators who appear from a location other than a space  
230       described in Paragraph 8 with a digital or physical backdrop that simulates a physical  
231       hearing room or other official space.

### **Training and Support**

- 232       10. Agencies should provide training for adjudicators on conducting virtual hearings.
- 233       11. Agencies should provide adjudicators with adequate technical and administrative support  
234       so that adjudicators are not responsible for managing remote participants (e.g., admitting



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235 or removing participants, muting and unmuting participants, managing breakout rooms)  
236 or troubleshooting technical issues for themselves or other participants before or during  
237 proceedings. Agencies should provide advanced training for administrative and technical  
238 support staff to ensure they are equipped to manage virtual hearings and troubleshoot  
239 technical problems that may arise before or during proceedings.

240 12. Agencies should consider providing general training sessions or pre-hearing conferences  
241 at which staff can explain expectations, technological requirements, and procedural rules  
242 for virtual hearings to parties and representatives.

### **Assessment and Continuing Development**

243 13. Agencies should try to measure how virtual hearings compare with proceedings  
244 conducted using other formats, including whether the use of virtual hearings affects  
245 procedural fairness or produces different substantive outcomes. Agencies should  
246 recognize the methodological challenges in assessing whether different hearing formats  
247 produce comparable results.

248 14. Agencies should collect anonymous feedback from participants (using, for instance, post-  
249 hearing surveys) to determine and assess participants' satisfaction with the virtual format  
250 and identify any concerns. Agencies should also maintain open lines of communication  
251 with representatives in order to receive feedback about the use of virtual hearings.  
252 Agencies should collect feedback in a manner that complies with the Paperwork  
253 Reduction Act and review this feedback on a regular basis to determine whether any  
254 previously unrecognized deficiencies exist.

255 15. Agencies should monitor technological and procedural developments to seek to ensure  
256 that options for individuals to participate remotely in adjudicative proceedings remain  
257 current and that those options reasonably comport with participants' expectations.

258 16. Agencies should share information with each other in order to reduce costs, increase  
259 efficiency, and provide a hearing experience that seeks to ensure fairness and participant  
260 satisfaction. To help carry out this recommendation, the Office of the Chairman of the  
261 Administrative Conference should provide, as authorized by 5 U.S.C. § 594(2), for the



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262 “interchange among administrative agencies of information potentially useful in  
263 improving” virtual hearings and other forms of remote participation in agency  
264 adjudicative proceedings.